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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 92

WALTER P. GARDNER, Trustee of the Central Railroad Company of New Jersey,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF GROUP OF INSTITUTIONAL INVESTORS, WATTERS COMMITTEE OF BONDHOLDERS, BROOKS COMMITTEE OF BONDHOLDERS AND CENTRAL HANOVER BANK & TRUST COMPANY AS *AMICI CURIAE*

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December 17, 1946.

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Preliminary Statement

This reply brief is directed solely to a question interjected by the State in its brief which is inappropriate for consideration at this time. That question is whether or not the State's claim, if any, may be ultimately satisfied by the issuance of securities in a plan of reorganization. We believe that the State's position with respect to that question is unsound and that Section 77 of the Bankruptcy Act clearly authorizes the issuance of securities in reorganization for satisfaction of state claims under the proper

circumstances. However, we believe this to be an inappropriate time to argue that question for the reasons that not only is that question irrelevant to the issues before this Court in this proceeding but it is a wholly hypothetical one that should not and cannot be passed on by the Court at this time.

I.

The Question Is Wholly Irrelevant to the Issues Before the Court

The question of the manner in which the State's unpaid claim, if any, is to be satisfied has no bearing upon the question of the proper forum for determining the amount of the State's claim or the legal principles applicable in making that determination. If it be determined that the State has any remaining unsatisfied claim, the question of how that claim is to be ultimately paid involves wholly different considerations from those bearing upon the questions of by whom and with respect to what legal principles the adjudication of the claim shall be had.

The question of the *adjudication* of the State's claim involves certain legal questions that have been discussed in our main brief and in the main brief of the Trustee of the Debtor. On the other hand, the question of the *payment* of the State's claim, if any, involves certain practical problems, such as the sufficiency of the assets to pay the claim; what assets may be made available to pay it without destroying the public service rendered by the carrier; and other similar questions, each of which must be viewed in the light of all the relevant facts.

We think it clear that this question is no more relevant to a determination of the pending issues than would be a

determination at this time of any one of a number of questions that might conceivably arise out of the possible means of satisfying the State's claim, if any.

II.

The Question Interjected by the State Is Wholly Hypothetical and Cannot Be Properly Decided at This Time

The question of whether the State may be required to accept bonds for satisfaction of its claim, if any, is not now before the Court and may never arise. If it is ultimately determined that the State has no additional claim, the question clearly cannot arise.

On the other hand, even if the State is ultimately found to have an additional claim secured by a prior lien, or otherwise entitled to priority, that claim may be in an amount which could be satisfied out of cash on hand and consequently the question raised by the State need never be determined. As recognized by the State in its brief (p. 52), this Court has always refused to give advisory opinions or pass upon questions that are not involved in the issues before it.

Not only is the question hypothetical but its ultimate determination, if required, is dependent upon important questions of fact that do not appear of record here, for the reason that it was never contemplated that such an issue would be raised in this proceeding. In addition to the absence of any factual record, there are also lacking the requisite determinations by the Interstate Commerce Com-

mission that are essential in passing upon questions involving public service provided by interstate carriers and problems of capitalization. These determinations must be made before any decision can properly be made by this Court.

For example, should it become necessary to satisfy any additional prior lien claim of the State, the cash on hand may have to be allocated as between the payment of such a claim and the reservation of sufficient working capital to continue essential operations. Such a determination calls for the exercise of the expert and informed judgment of the Interstate Commerce Commission. On the other hand if no cash is available for satisfaction of such a claim, the question arises whether the State should be permitted to foreclose its lien, liquidate the property and terminate the operations of an interstate carrier. If it is not to be permitted to do this, a further question may arise as to what, if any, assets are available for liquidation and how they are to be liquidated. Or, if no assets are available for liquidation, what other means, such as issuing securities of a reorganized company, is available for satisfaction of such a claim. Moreover, if securities are the only possible means of satisfying such a claim without complete cessation of public service, the question arises as to what type of securities can be given to the State that will be compatible with the continuance of the Debtor's public service.

All of these questions depend on the basic questions of the public interest and the value of the properties involved,

which the Interstate Commerce Commission is the appropriate and the designated tribunal to determine. All of them involve a determination of a multitude of facts which are not of record and cannot be of record until the issue is properly presented at an appropriate phase of the reorganization proceeding. All of them call for the exercise of the expert and informed judgment of the Commission, which this Court has found requisite in dealing with similar problems in other railroad reorganizations.

In one of its most recent decisions, *Thompson v. The Texas Mexican Ry. Co.*, 90 L. ed. 886, 896, decided April 29, 1946, this Court said:

> "Thus, however the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature."

The bald legal question raised by the State cannot be considered apart from the facts out of which it may arise. No opportunity has been given to present those facts and the Interstate Commerce Commission has had no opportunity to appraise them. We respectfully submit that this Court should not attempt to pass on the question thus interjected by the State, until such time, if ever, as the question may properly come before it.

Conclusion

For the reasons set forth above we urge that the Court refrain from expressing any views with respect to the question of whether or not the State's claim may ultimately be satisfied by the issuance of securities in a plan of reorganization.

Respectfully submitted,

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